No. 80-525

IN THE

Supreme Court of the United

October Term, 1980

ROBERT BUSCHMANN,

Petitioner,

vs.

THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION

and

THE BOARD OF COMMISSIONERS OF PILOTS,

Respondents.

BRIEF OF RESPONDENT THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Counter-Statement of the Question Presented for Review

Did the New York State Court of Appeals abuse its discretion in holding that, in the circumstances of this case, the appropriate remedy for the dismissal of petitioner, Robert Buschmann, from his employment with respondent, The United New York Sandy Hook Pilots' Association ("Association") in violation of his due process right to a hearing, is for the Association to hold a hearing upon Buschmann's request, at which Buschmann will have the opportunity to confront witnesses and to rebut such evidence as may be adduced against him?

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BRIEF OF RESPONDENT THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, The United New York Sandy Hook Pilots' Association ("Association"), respectfully prays that the Court deny the Petition for a Writ of Certiorari to review the final order of the Court of Appeals of the State of New York entered on July 3, 1980.

Counter-Statement of the Case

A. Background

To be licensed as a Sandy Hook pilot under the New York Navigation Law, one first must serve an apprenticeship as specified in the Navigation Law. Specifically, the law provides that the Executive Committee of The United New York Sandy Hook Pilots' Benevolent Association ("Benevolent Association"), an unincorporated association that owns all of the outstanding stock of respondent Association (R 101),* has the sole responsibility of training apprentices to become Sandy Hook pilots. To be admitted to this apprenticeship, an applicant must apply to The Board of Commissioners of Pilots ("Commissioners") and, if the Commissioners accept the application, they register the applicant's name on their books and certify that name to the Benevolent Association as a duly registered apprentice. Thereafter, the registered apprentice serves in an apprenticeship, which the Benevolent Association conducts, of not less than four years, at the end of which the Commissioners formally examine the apprentice. If the Commissioners find the apprentice qualified, they license him as a Sandy Hook pilot. *N.Y. Nav. Law,* §90 (McKinney Supp. 1979-80).

In addition to the apprenticeship training program it provides for those apprentices whom the Commissioners register, the Benevolent Association, through respondent

* References prefixed "R" refer to the Record on Appeal to the Court of Appeals in 1975; references prefixed "P" refer to pages of the Petition for a Writ of Certiorari and references prefixed "A" refer to pages of the appendix included in the Petition. References to the Appendix, *infra,* will be denoted "——a".

Association, offers a pre-registration training program of approximately three and one-half years in duration to its employees who man the Association's pilot boats and who wish to take advantage of this training to improve their qualifications before applying to the Commissioners for registration as an apprentice in the Sandy Hook pilot apprenticeship program (R 102).

B. Robert Buschmann

In January 1970, the Association hired petitioner, Robert Buschmann, and he joined this pre-registration training program (R 102). Before he completed the program and applied to the Commissioners for registration as an apprentice, criminal charges were leveled against him, asserting that he had made obscene telephone calls to the wife of another employee of the Association, Bruce Punger, who was a pilot apprentice registered on the books of the Commissioners (R 102-103). Buschmann requested, and the Association granted him, a leave of absence to fight the charges (R 103). Thereafter, the District Court of the County of Nassau adjourned a criminal trial of the charges in contemplation of dismissal on the court-imposed condition that Buschmann undergo psychiatric consultation (R 110-113).

Buschmann then sought to continue his employment with the Association. However, in view of the kind of animosity accusations of the character here involved are likely to generate, and in view of the facts then known to it, the Executive Committee of the Benevolent Association, which constitutes the Board of Directors of the Association, asked Buschmann to resign and, when he refused, the Association terminated him in February 1973 (R 104-105).

On May 25, 1973, Buschmann's attorney appeared before three of the four members of the Executive Committee and presented to them on Buschmann's behalf reasons why he believed the Executive Committee should reconsider its decision. As a result of this hearing, the full Executive Committee reconsidered Buschmann's request for reinstatement and his arguments with respect thereto, and decided not to reinstate him (R 81-82, 105-106).

C. The State Court Proceedings

In October 1973, Buschmann instituted a special proceeding under Article 78 of the New York Civil Practice Law and Rules, N.Y. Civ. Prac. Law §§7801, *et seq.* (McKinney 1963), in the Supreme Court of the State of New York, Kings County, against the Association and the Commissioners, alleging that the Association discharged him from employment in violation of the New York Navigation Law and the Fourteenth Amendment of the U.S. Constitution, in that his dismissal was not preceded by a hearing on the reasons for his dismissal (R 7-31). Buschmann asked the court to order his reinstatement to the Association with full seniority and award him any back pay that he lost as a result of his dismissal. The Supreme Court held that neither the Navigation Law nor the procedural due process mandates of the Fourteenth Amendment required respondents to give Buschmann a hearing and dismissed the petition in all respects on the merits (A 1). The Appellate Division, with Justices Shapiro and Hopkins dissenting, affirmed the order of the Supreme Court (A 2-10).

Buschmann appealed to the Court of Appeals which, on December 22, 1975, after reviewing the record before it and after hearing oral argument by all parties, reversed the order of the Appellate Division (A 11). The Court of Appeals did not hold that respondents violated either the Navigation Law or the Fourteenth Amendment when the Association dismissed Buschmann without a hearing. Rather, the Court of Appeals remanded the case to the Supreme Court for an evidentiary hearing on the dissenting opinion of Justice Shapiro in the Appellate Division.

Specifically, Justice Shapiro had argued that, even if the record before the court did not establish a violation of the Navigation Law or the Fourteenth Amendment, Buschmann should be afforded the opportunity to present, at an evidentiary hearing before the Supreme Court, evidence of alleged representations made to him that, if true, would create a constitutional "property interest" in his employment. Concerning the remedy to be imposed in the event Buschmann successfully established such a property interest, Justice Shapiro had emphasized,

> ". . . As the Supreme Court said in *Perry* v. *Sindermann* (*supra*, p. 603), 'Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate * * * [the respondents] to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency'." (A 10).

Accordingly, upon remittitur, the Supreme Court (per Pino, J.), in accordance with the mandate of the Court of Appeals, stated its duty as follows:

> "It is appropriate, in accordance with the dissenting opinion of Mr. Justice Shapiro, to apply the principles

> of [*Perry* v. *Sindermann*, 408 U.S. 593 (1972)]. Therefore, if the petitioner, at this evidentiary hearing, has adduced sufficient proof 'arising from rules and understandings officially promulgated and fostered' that the 'pre-apprenticeship' program, as termed by respondents, in which petitioner was engaged during his employment and prior to his discharge, was *de facto* 'Part and parcel of the apprenticeship program itself', then he will have established a constitutionally protected property interest. *In such event, he is entitled to a future hearing at his request, to challenge the sufficiency of his discharge by the respondent employer*'' (A 13, emphasis added).

Following the evidentiary hearing in October 1978, the Supreme Court held that Buschmann had established a property interest in his continued employment by the Association (A 12-21) and, accordingly, issued the following Judgment:

> ''[R]espondent, The United New York Sandy Hook Pilots' Association, shall, within 20 days of petitioner, Robert Buschmann's, written request, serve upon him a complaint setting forth in specific detail the grounds upon which he has been discharged. The petitioner shall answer such complaint within 20 days thereafter, and respondent, The United New York Sandy Hook Pilots' Association, shall, within 20 days after the service of the answer, hold a hearing upon ten days notice to the petitioner, as to the time and place of such hearing. At such hearing, a stenographic record of the proceedings shall be made and petitioner shall have the oportunity to confront witnesses and to rebut such evidence as may be adduced against him'' (2a-3a).

Following the Supreme Court's decision and entry of the Judgment, Buschmann did not pursue the course the

New York Supreme Court prescribed to give him a hearing on the reasons for his discharge. Rather, on March 28, 1979, Buschmann appealed to the Appellate Division, alleging, *inter alia,* that the Supreme Court wrongly had denied him reinstatement and back pay. The Appellate Division unanimously affirmed the Supreme Court's Judgment, on the memorandum opinion of Judge Pino (A 22-25).

Buschmann sought an appeal as of right to the New York State Court of Appeals which, on March 20, 1980, the court dismissed upon the ground that "no substantial constitutional question [was] directly involved" (A 26). Thereafter, Buschmann moved for reargument or, in the alternative, for leave to appeal to the Court of Appeals, which the Court denied (A 27). He then filed his Petition for a Writ of Certiorari to this Court on October 1, 1980.

Summary of Argument

The Court should deny the petition. Contrary to Buschmann's contention, the decision of the New York State Court of Appeals does not conflict with decisions of federal Courts of Appeal on a federal question.

The Court of Appeals correctly decided, in the circumstances of this case, that the proper remedy for the Association's not giving Buschmann a hearing on the reasons for his discharge, is for the Association to give Buschmann that hearing within the structure the New York Supreme Court outlined to ensure fundamental fairness and compliance with due process. The Supreme Court's decision in *Perry* v. *Sindermann,* 408 U.S. 593 (1972) requires no more. Federal Courts of Appeal, following *Perry* v. *Sin-*

dermann, supra, clearly have stated that the question of remedy for a violation of procedural due process is a matter within the discretion of the trial court and therefore depends on the circumstances of each case. Thus, Buschmann's claim that the decision of the New York State Court of Appeals *conflicts* with decisions of federal Courts of Appeal that, in the circumstances of those cases, reinstated the terminated employees with back pay, is wrong because he assumes, contrary to law, that reinstatement with back pay was ordered in those cases on the ground that constitutional procedural due process *requires* reinstatement with back pay.

ARGUMENT

The Court should deny the petition because, contrary to petitioner's contention, the New York State Court of Appeals has not decided a federal question in a way that conflicts with decisions of federal Courts of Appeal.

In this proceeding under Article 78 of the New York Civil Practice Law and Rules, N.Y. Civ. Prac. Law §§7801, *et seq.* (McKinney 1963), Buschmann alleged that the Association discharged him from employment in violation of, *inter alia,* the Fourteenth Amendment to the U.S. Constitution because it did not give him a hearing on the reasons for his discharge. He ultimately prevailed on this contention and, accordingly, the New York State Supreme Court, on remittitur from the Court of Appeals, ordered the Association to give him a hearing on the reasons for his discharge. Buschmann now argues to this Court, as he unsuccessfully argued to the New York State Court of Appeals,

that, because some federal Courts of Appeal have ordered reinstatement with back pay to remedy violations of procedural due process in the circumstances of those cases, the New York State Court of Appeals violated the Fourteenth Amendment by not ordering his reinstatement with back pay in the circumstances of this case. He is wrong as a matter of law.

In *Perry* v. *Sindermann, supra,* this Court stated the relief that must be afforded persons, such as Buschmann, who courts find have a "property interest" in their continued employment and who consequently have been denied procedural due process by being terminated without a hearing on the underlying reasons for their terminations.

> "Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency" (*Id.,* at 603).

This is precisely the relief afforded Buschmann.

Subsequent to its decision in *Perry* v. *Sindermann, supra,* this Court further clarified the limited extent of the constitutional procedural due process right by holding that this right does not necessarily *require* a hearing *before* the deprivation of a property interest. *Arnett* v. *Kennedy,* 416 U.S. 134, *rehearing denied,* 417 U.S. 977 (1974). Although unable to agree on a single opinion, a majority of this Court in *Arnett* agreed that, assuming the existence of a property interest in continued employment that requires a hearing on the reasons for termination, it is constitutionally per-

missible to hold this hearing *after* termination.* Clearly, therefore, since due process does not *require* a pretermination hearing, it does not *require* reinstatement with back pay pending the hearing in this case.

Buschmann attempts to circumvent this Court's express teaching in *Perry* v. *Sindermann, supra* and *Arnett* v. *Kennedy, supra,* that proof of a property interest does not mandate reinstatement with back pay pending a due process hearing, by citing a number of cases in which federal courts granted reinstatement with back pay pending such a hearing. In other words, Buschmann argues that because some federal courts, in circumstances completely different from the facts of this case, granted reinstatement pending a due process hearing, the New York Court of Appeals abused its discretion in fashioning the relief it directed in this case by failing to direct reinstatement with back pay.

Specifically, Buschmann argues that the remedy in this case conflicts with decisions of the Courts of Appeal for the Third, Fourth and Ninth Circuits (P 18). However, rather than supporting his contention that due process requires reinstatement with back pay pending a hearing, the cases he refers to show that the courts use their discretion in the circumstances of each case to fashion an appropriate remedy.

For example, in *Cain* v. *McQueen,* 580 F.2d 1001 (9th Cir. 1978), relied on by Buschmann (P 15-16) the court stated,

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* *See also, Alsbury* v. *United States Postal Service,* 530 F.2d 852 (9th Cir.), *cert. denied,* 429 U.S. 828 (1976); *Winston* v. *United States Postal Service,* 432 F. Supp. 1117 (N.D. Ill. 1977), *aff'd,* 585 F.2d 198 (7th Cir. 1978).

> "Plaintiff contends that in addition to a hearing, she is entitled to reinstatement and back pay. This question presents a difficult issue in which a 'careful weighing of all facts and circumstances' must take place. *Burton* v. *Cascade School Dist. Union High School No. 5*, 512 F.2d 850, 853 (9th Cir. 1975). There must be a balancing of plaintiff's interests in her wrongfully terminated teaching position against the possible disruption which her reinstatement may cause the school district *Id.*, at 852-53" (*Id.*, at 1005, citation omitted).

The court went on to emphasize,

> "Not all cases that have found violations of procedural due process and where hearings have been ordered have granted reinstatement and back pay, however. e.g., *Burton* v. *Cascade School Dist. Union High School No. 5*, 512 F.2d 850 (9th Cir. 1975); *Greene* v. *Howard University*, 134 U.S. App. D.C. 81, 412 F.2d 1128 (1969). The disadvantage to the school district should be carefully considered" (*Id.*, at 1006).

Significantly, the court did not order reinstatement and back pay, but left the question of remedy to the discretion of the trial court.

Similarly, in *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir.), *vacated and remanded on other grounds*, 421 U.S. 983 (1974), *cert. denied*, 429 U.S. 979 (1976), relied on by Buschmann (P 13-15), the Third Circuit stated that the "reinstatement remedy has been awarded frequently for terminations unlawful for procedural defects" (*Id.*, at 40), but declined to reinstate Skehan in the circumstances of that case, thereby recognizing that due process does not mandate reinstatement with back pay.

In *McNeill* v. *Butz*, 480 F.2d 314 (4th Cir. 1973), relied on by Buschmann (P 12), the court, likewise recognizing that procedural due process requires a balancing of interests and does not mandate reinstatement with back pay, stated,

> "Procedural due process is a necessary concomitant of a democratic government's obligation to practice fairness . . . However, the requirements of procedural due process may flexibly be adapted to the demands of particular contexts . . ." (*Id.*, at 321, citations omitted).

Hence, there is no question that, regardless of whether in some circumstances a court may award reinstatement with back pay for a violation of procedural due process, the Fourteenth Amendment does not require such a remedy, which is left to the discretion of the court fashioning the remedy. Indeed, in *Bishop* v. *Woods*, 426 U.S. 341 (1976), this Court, holding that the petitioner did not have a property or liberty interest in the circumstances of that case, emphasized,

> "[T]he instances in which the federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing are extremely rare" (*Id.*, at 349, n. 14).

In fact, federal Courts of Appeal time and time again have held that violations of procedural due process do not require reinstatement with back pay. *See, for example, DiLuigi* v. *Kafkalas*, 584 F.2d 22, 27 n. 7 (3rd Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Unified School Dist. No. 480* v. *Epperson*, 551 F.2d 254 (10th Cir.), *vacated and remanded on other grounds*, 435 U.S. 948 (1977); *Navato* v. *Sletten*,

560 F.2d 340 (8th Cir. 1977); *Decker* v. *North Idaho College*, 552 F.2d 872 (9th Cir. 1977); *Mims* v. *Board of Ed. of City of Chicago*, 523 F.2d 711 (7th Cir. 1975); *Wellner* v. *Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973).

Thus, Buschmann clearly is wrong when he argues that, when the New York Court of Appeals refused to reinstate him with back pay pending his hearing in the circumstances of this case, it decided a federal question in conflict with several federal Courts of Appeal, simply because, in a few cases, those courts held that reinstatement with back pay was the appropriate remedy in the circumstances of those cases. The New York State Court of Appeals in the circumstances of this case satisfied the requirements of procedural due process by ordering the Association to give Buschmann a hearing on the reasons for his discharge, if he requests it. There is no reason for this Court to review its decision.*

Finally, Buschmann contends that the New York State Court of Appeals violated due process by ordering the Association to conduct the hearing (P 11, 18), stating that it is "inconceivable that after seven years the Association would reinstate the petitioner following a hearing" (P 17). Not only is his assumption totally without foundation,** his conclusion clearly is illogical since there can be

* Clearly, if Buschmann effectively rebuts the evidence against him at the hearing and proves that his discharge was arbitrary and capricious he will be entitled to reinstatement and back pay, less his earnings from other sources.

** Certainly, it is not this Court's function to assume, as Buschmann apparently has assumed, that the Association will *not* comport with due process and give him a fair hearing.

no doubt that the detailed procedures outlined in the Judgment, which include a requirement for a stenographic record of the hearing (3a), fully protect his right to a fair hearing. In fact, in *Perry* v. *Sindermann, supra,* this Court recognized the appropriateness of this relief when it ruled that, if Sindermann established a property interest, *college officials* should give him the hearing on the reasons for discharge.*

Conclusion

For all the foregoing reasons, this Court should deny Buschmann's Petition for a Writ of Certiorari.

Respectfully submitted,

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PAUL L. BRESSAN

October 30, 1980

* Certainly, Buschmann has the right to return to court if he believes there was any impropriety with the hearing.

APPENDIX

Judgment of the Supreme Court of the State of New York, dated January 18, 1979

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 21535/73

In the Matter of the Application of

ROBERT BUSCHMANN,

Petitioner-Appellant,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

THE UNITED NEW YORK SANDY HOOK PILOTS' ASSOCIATION

and

THE BOARD OF COMMISSIONERS OF PILOTS,

Respondents-Appellees.

The issues in the above-entitled action having duly come on to be heard before the Hon. Frank J. Pino, a justice of this court, without a jury, at a Trial Term, Part 14, of this Court, held at the courthouse thereof, located at Supreme Court Building, Brooklyn, New York 11201, on the 27th day of September, 1978, and the petitioner, Robert Buschmann, having appeared by his attorneys, Rains, Pogrebin & Scher, Harry H. Rains and Frederick D. Braid, of counsel, and the

respondent, The United New York Sandy Hook Pilots' Association, having appeared by its attorneys, Kelley Drye & Warren, Frederick T. Shea and Paul L. Bressan, of counsel, and the respondent, The Board of Commissioners of Pilots, having appeared by its attorneys, Bigham Englar Jones & Houston, Donald M. Waesche and Richard W. Stone, II, of counsel, and the issues having been duly tried, and the court having considered the briefs filed by petitioner, Robert Buschmann, and respondents, The United New York Sandy Hook Pilots' Association and the Board of Commissioners of Pilots, and the court after due deliberation having rendered and filed its decision in writing, dated December 13, 1978, in favor of the petitioner, Robert Buschmann, and against the respondents, The United New York Sandy Hook Pilots' Association and The Board of Commissioners of Pilots, and directing entry of judgment thereon,

Now, on motion of Rains, Pogrebin & Scher, Harry H. Rains and Frederick D. Braid, of counsel, attorneys for petitioner, it is

ORDERED, ADJUDGED AND DECREED, that respondent, The United New York Sandy Hook Pilots' Association, shall, within 20 days of petitioner, Robert Buschmann's, written request, serve upon him a complaint setting forth in specific detail the grounds upon which he has been discharged. The petitioner shall answer such complaint within 20 days thereafter and respondent, The United New York Sandy Hook Pilots' Association, shall, within 20 days after the service of the answer, hold a hearing upon ten days notice to the petitioner, as to the time and place of such hearing.

At such hearing, a stenographic record of the proceedings shall be made and petitioner shall have the opportunity to confront witnesses and to rebut such evidence as may be adduced against him.

Judgment signed this 18th day of January, 1979.

/s/ Frank J. Pino
Judge

/s/ Anthony N. Durso
Clerk

FILED

'79 Jan 29 No: 30
Kings County Clerk
Fee ————